8-11-2017

State v. Sittre Appellant's Reply Brief Dckt. 44571

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 44571**
	)	
v.	)	**BANNOCK COUNTY NO. CR 2014-15695**
	)	
JONNINE LISA SITTRE,	)	
	)	**REPLY BRIEF**
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

HONORABLE ROBERT C. NAFTZ
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Jonnine Sittre contends the district court abused its discretion by denying her motion to withdraw her guilty plea, which was based on her presentation of new evidence about the testimony an alibi witness whose location was not known or reasonably discoverable in her DUI case. The State responds that, because Ms. Sittre had always maintained she had not been driving the car, the new alibi witness might have "new evidence" but that did not amount to "newly discovered evidence."

The State cites no authority in support of its argument about that distinction. In fact, the Court of Appeals has expressly rejected that argument. The Court of Appeals has also rejected the State's other argument that the admissions Ms. Sittre made during the change of plea hearing should justify denying her motion. Under the proper standard, her new evidence established a just reason for her to withdraw her plea. Furthermore, the State has failed to carry its burden to prove that prejudice would result from granting the motion, especially since its theory of prejudice on appeal was a theory the prosecutor refused to pursue when the district court expressly asked him about it.

Therefore, this Court should reverse the order denying Ms. Sittre's motion to withdraw her guilty plea and remand this case for further proceedings.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Ms. Sittre's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Whether the district court abused its discretion when it denied Ms. Sittre's pre-sentence motion to withdraw her guilty plea.

ARGUMENT

The District Court Abused Its Discretion When It Denied Ms. Sittre's Pre-Sentence Motion To Withdraw Her Guilty Plea

A. The Court Of Appeals Has Expressly Rejected The State's Argument That New Evidence About An Alibi Witness Does Not Show Just Reason To Withdraw A Guilty Plea

The State does not cite any authority in support of its attempt to draw a distinction between "new evidence" and "newly discovered evidence." (*See generally* Resp. Br., pp.8-11.) In fact, there is no authority the State could have cited in support of that position because the Court of Appeals has already rejected that argument. *State v. Ames*, 112 Idaho 144, 146-47 (Ct. App. 1986). In *Ames*, "the state assert[ed] that the 'newly discovered evidence is not really new because the facts contained in the [witness's] affidavit concerning Ames' activities the evening and morning of the assault were known to Ames at the time of the trial." *Id*. (emphasis omitted). That argument was erroneous because it "seriously distorts the first element of the *Drapeau* test."[1] *Id.* at 147.

Specifically, the *Ames* Court explained: "[u]nder the state's approach the testimony of a newly discovered alibi witness could never be 'newly discovered evidence' because the testimony would tend to corroborate facts already believed by the defendant. The state's

[1] In *State v. Drapeau*, 97 Idaho 685 (1976), the Idaho Supreme Court explained that, to demonstrate that newly discovered evidence is sufficient to justify a motion for a new trial, a defendant must show: that the evidence was unknown to the defendant at the time of the trial; that the evidence is material and not merely cumulative or impeaching; that its presentation would probably result in an acquittal; and that the failure to identify this evidence before trial was not due to a lack of due diligence by the defendant. A similar analysis is used to assess motions to withdraw guilty pleas based on newly discovered evidence. *See State v. Hocker*, 115 Idaho 137, 139 n.2 (Ct. App. 1998) (noting that new evidence can constitute a basis to withdraw a guilty plea if the nature of that new evidence is established on the record); *see also United States v. Garcia*, 401 F.3d 1008, 1011 (9th Cir. 2005) (articulating that standard for the analogous federal rule).

position contradicts the whole theory underlying an alibi witness." *Id.* Rather, the Court of Appeals held, the proper rule in such cases is: "Although the content of an absent witness' testimony may be *predicted*, it is not 'known' until that witness is contacted. If the witness cannot be contacted until after trial, the evidence is 'newly discovered' within the meaning of the first element of *Drapeau*." *Id.* (emphasis from original).

Therefore, the State's argument in this case – that Barry's letter might be "new evidence," but was not "newly discovered evidence" because his letter was consistent with the theory of the case Ms. Sittre had articulated from the outset of this case (Resp. Br., p.8) – is directly contrary to well-established precedent. *See, e.g., State v. Hayes*, 144 Idaho 574, 577-78 (Ct. App. 2007) (reaffirming and applying the rule from *Ames*); *State v. Caldwell*, 112 Idaho 748, 753 (Ct. App. 1987) (same); *see also State v. Eddins*, 142 Idaho 423, 426-27 (Ct. App. 2006) (reaffirming, but distinguishing, the rule from *Ames* because the defendant in *Eddins* had actually been able to contact the potential witness before trial). Under the proper standard, Ms. Sittre's evidence constitutes newly discovered evidence. While she might have been able to predict that testimony, it was not known to her since she had not been able to talk to Barry prior to pleading guilty, as he had disappeared immediately following the accident. (*See* R., p.246.)

Indeed, as the notarized letter from Ms. Sittre's sister reveals, Barry was a transient from Utah, meaning there was no formal address at which to contact him. (R., p.243.) As such, Ms. Sittre's case is almost identical to *Ames*, where the potential alibi witness had moved out of state without leaving a forwarding address. *Ames*, 112 Idaho at 147. As in *Ames*, "[n]othing in the record leads us to conclude that an exercise of due diligence would have turned up the witness' location." *See id.* Therefore, the substance of Barry's potential testimony was not known, and could not reasonably have been known, at the time Ms. Sittre decided to accept the

plea offer made by the State.[2] Ergo, as in *Ames*, Ms. Sittre's new evidence about the potential alibi witness constitutes newly discovered evidence.

The fact that Ms. Sittre presented this new evidence of a potential alibi witness's testimony also belies the State's contention (*see* Resp. Br., p.7) that she is making a mere claim of innocence. *See State v. Johnson*, 120 Idaho 408 (Ct. App. 1991) (finding a district court abused its discretion by denying a motion to withdraw a guilty plea in light of new evidence which supported the defendant's assertion of innocence); *compare Zepeda v. State*, 152 Idaho 710, 716 (Ct. App. 2012) (finding no error in trial counsel's failure to file a motion to withdraw a plea because the defendant only supported his claim of innocence with inadmissible evidence and did not demonstrate why he could not have brought that evidence forward earlier).[3] In fact, Ms. Sittre recognized she could not legitimately file a motion to withdraw her plea based on her bare assertion alone: "I always wanted to withdraw this guilty plea, and now I have new evidence" to support a motion to do so. (2/22/16 Tr., p.11, Ls.12-13.) Therefore, the State's arguments in regard to the sufficiency of Ms. Sittre's evidence to support her motion are meritless.

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[2] As Ms. Sittre explained in her initial brief, Barry's testimony was material to her case, as it would have given her a complete alibi to the charged act. (*See* App. Br. pp.7-8.) By that same token, it was testimony which was likely to produce an acquittal if presented to a jury. *Compare Hayes*, 144 Idaho at 578-80 (determining that similar alibi evidence was material and likely to produce and acquittal). The State did not raise any meaningful challenges in either of these respects in its Respondent's Brief. *Compare Caldwell*, 112 Idaho at 753 (noting that "[t]he state does not seriously contend there was a failure to meet this standard" in regard to the due diligence requirement).

[3] Barry's potential testimony was not known until he wrote his letter seven months after the change of plea hearing (*see* R., p.246), and, as discussed *supra*, Ms. Sittre could not reasonably have located him prior to that point. Additionally, if Barry could not be made available to give testimony about the relevant events, as trial counsel indicated he could (3/14/16 Tr., p.36, L.10), his statements to Ms. Sittre and her sister would be admissible as a statement against interest under I.R.E. 804(b)(3). (*See* App. Br., p.7 n.9.) Therefore, neither of the two issues that existed in *Zepeda* are present in Ms. Sittre's case.

B. Under The Proper Standard, Ms. Sittre's Evidence About The New Alibi Witness Constitutes A Just Reason To Withdraw Her Guilty Plea

Turning to the well-established standard for granting a motion for withdrawal of a guilty plea, Ms. Sittre's new evidence presents a just reason to allow withdrawal of her guilty plea. *See State v. Arthur*, 145 Idaho 219, 222 (2008) (reaffirming the "just reason" standard). The State contends there is no just reason to grant the motion because of the admissions Ms. Sittre necessarily made in the process of entering the guilty plea she now seeks to withdraw. (*See* Resp. Br., pp.6-8.) However, that argument has also been rejected by the Court of Appeals: "That a court may accept an otherwise valid guilty plea, even though the defendant denies criminal intent, does not necessarily preclude the court from later allowing the defendant to withdraw the plea." *State v. Howell*, 104 Idaho 393, 396 (Ct. App. 1983) (citing I.C.R. 33(c)).

This point is actually illustrated by the Court of Appeals' decision in *Johnson*. There, the defendant had pled guilty to soliciting the infamous crime against nature, but, prior to sentencing, moved to withdraw that guilty plea on the basis that he had discovered new information which would, consistent with his account from the outset of the case, tend to negate an element of the charged offense. *Johnson*, 120 Idaho at 410, 412-13. The *Johnson* Court noted that, "when questioned by the court to determine whether his plea was being entered knowing, voluntarily and intelligently, as required in I.C.R. 11(c), Johnson admitted the acts with which he was charged in the information." *Id*. Despite those admissions, the Court of Appeals determined "the lesser 'just reason' standard for withdrawal of the plea applies" to his ensuing presentence motion to withdraw that plea based on his denial of the charged conduct in light of the newly discovered evidence. *Id*. at 413-14. Under the "just reason" standard, the Court of Appeals held that the district court had abused its discretion by not granting the motion to withdraw his plea. *Id*. at 414-15. Thus, as *Johnson* demonstrates, the fact that Ms. Sittre may

have made certain admissions as part of entering her plea in the first place is not a basis upon which to deny her subsequent motion to withdraw that plea based upon the discovery of new evidence.

That is not to say that the plea colloquy is always irrelevant to all motions to withdraw a guilty plea; the potential relevance simply depends on the reason the defendant gives for withdrawing that plea. For example, when a defendant claims he should be allowed to withdraw his plea because had not been adequately informed of the consequences of his plea prior to entering it, but the colloquy shows the judge did, in fact, inform him of those consequences, the district court could properly find there was no just reason to allow for withdrawal of the plea. *See State v. Hansen*, 120 Idaho 286, 290-91 (Ct. App. 1991). However, in cases like *Johnson* and Ms. Sittre's, where the just reason for withdrawing the plea is the discovery of new evidence which was not available at the time the plea was entered, nothing that happened during plea colloquy is relevant because there is a reasonable possibility that, had the defendant had access to the later-discovered evidence, she would have decided to not plead guilty in the first place. *See State v. Gardner*, 126 Idaho 428, 436-37 (Ct. App. 1994).[4]

Besides, the admissions upon which the State's argument relies will exist in virtually every case where the defendant has entered a plea and then seeks to withdraw that plea. *See* I.C.R. 11(c) (requiring that, before the district court can accept a guilty plea in the first place, it must ensure the defendant's admissions are knowing, intelligent, and voluntary);

[4] In *Gardner*, the defendant did not remember the critical events and pled guilty primarily because of the weight of the State's evidence. *Gardner*, 126 Idaho at 436-37. Similarly, Ms. Sittre did not remember the critical events surrounding the accident and pled based on the weight of the state's evidence. *See* 5/11/15 Tr., p.21, L.5 - p.22, L.18, p.24, Ls.4-22.) However, she did also get the benefit of an agreement to presentence release from custody, dismissal of a persistent violator enhancement, and a sentencing recommendation for retained jurisdiction as part of her plea agreement. (*See* 5/11/15 Tr., p.8, L.20 - p.9, L.3.)

Schoger v. State, 148 Idaho 622, 628 (2010) (explaining that even an *Alford* plea[5] needs to include an admission that there is a strong factual basis for the charge). As such, adopting the State's position – that those admissions mean a person should not be allowed to withdraw her plea – would deprive I.C.R. 33(c) of meaning, as there would be no circumstance in which a guilty plea would be allowed to be withdrawn. *Compare Ames*, 112 Idaho at 146-47 (rejecting a similar argument because, by accepting such an argument, there would never be grounds for a withdrawal of a plea following the discovery of a new alibi witness).

Rather, as the Idaho Supreme Court has explained, the proper analysis is the two-part test which looks at whether the defendant has presented a just reason for withdrawing her plea and whether alleging that withdrawal would prejudice the State. *State v. Dopp*, 124 Idaho 481, 485 (1993). Under that analysis, Ms. Sittre presented newly discovered evidence which is material to the case and likely to produce an acquittal, and that constitutes a just reason to withdraw the guilty plea. *See, e.g., State v. Hocker*, 115 Idaho 137, 139 n.2 (Ct. App. 1988) (explaining that newly discovered evidence can be an adequate ground to withdraw a plea if the nature of such evidence is established on the record). The only remaining question, then, is whether granting that motion would prejudice the State.

C. The State Failed To Carry Its Burden To Prove That Allowing Ms. Sittre To Withdraw Her Plea Based On Her Just Reason Would Cause It Prejudice

The State bears the burden to prove prejudice under the proper two-part test. *Dopp*, 124 Idaho at 485. On appeal, it tried to meet that burden by pointing to the year-long delay caused by Ms. Sittre's failure to appear during the pretrial phase of this case. (Resp. Br., pp.10-11.) That argument is improper for several reasons.

[5] *North Carolina v. Alford*, 400 U.S. 25 (1970).

First, that theory of prejudice was not raised in the district court. In fact, the prosecutor actually chose not to pursue that argument when the district court specifically asked him about that issue:

> THE COURT: Do you have concerns with regard to being able to locate the witnesses that gave statements to the State with regard to what they saw at that time a year ago?
>
> [THE PROSECUTOR]: Your Honor, I don't know. I was trying to review the report. It's not contained in the file and so I don't -- *I can't really comment on that*. I was trying to figure out what the facts were at the time that the case was charged from argument today but I don't have those reports. I think this was broken down and set to prepare for trial at one point in time, so I don't have the reports. *I can't comment on that.*

(5/14/16 Tr., p.34, L.23 - p.35, L.11 (emphasis added).)

As the Idaho Supreme Court has recently reaffirmed, "appellate court review is limited to the evidence, theories and arguments that were presented below." *State v. Garcia-Rodriguez*, 162 Idaho 271, ___, 396 P.3d 700, 704 (2017), *reh'g denied* (internal quotation omitted). This is because "'[i]t is manifestly unfair for a party to go into court and slumber, as it were, on his defense, take no exception to the ruling, *present no point for the attention of the court*, and seek to prevent his defense, that was never mooted before, to the judgment of the appellate court.'" *Id*. (quoting *Smith v. Sterling*, 1 Idaho 128, 131 (1867)) (emphasis added). "This requirement applies equally to all parties on appeal." *Id*. That means the State's argument about the delay causing prejudice is not properly on appeal since it did not present an argument on that theory to the district court, and in fact, decided not to pursue that theory when expressly asked about it.

The only argument about prejudice which was actually presented to the district court was that Ms. Sittre should have brought up this evidence earlier. (*See* 5/14/16 Tr., p. 34, L.7 - p.35, L.14.) However, since Ms. Sittre could not have known about that evidence until seven months after the change of plea hearing, when Barry actually wrote and sent his letter to her (*see*

R., p.246), she could not have presented this evidence any earlier than she did. Besides the prosecutor's argument is erroneous under *Ames*, as it distorts the whole analysis of newly discovered evidence about a previously-unavailable alibi witness's testimony (*see* Section A, *supra*). Therefore, based on the argument it actually raised to the district court, the State has failed to carry its burden to prove prejudice.

Second, even considering the State's new theory of prejudice, the State has still failed to carry its burden because it does not identify any way in which the delay in this case actually impacts its ability to present its case. (*See generally* Resp. Br.) It is not an uncommon occurrence for a case to take a year or more to come to trial, and such delays do not necessarily prejudice even the defendant's constitutional right to a speedy trial. *See, e.g., State v. Warwick*, 123 Idaho 83, 90 (Ct. App. 1992) (reviewing cases with non-prejudicial delays spanning from nine to fourteen months and allowing for a delay in his case of sixteen months). Therefore, the simple fact that a delay occurred does not inherently show prejudice to the State. *See State v. Hawkins*, 115 Idaho 719, 769 P.2d 596, 599-600 (Ct. App. 1989) (explaining the difference between speculating that a witness's memory might be impaired due to the passage of time, which may not show prejudice, and actually proving the witness's lack of ability to recall events to the district judge by presenting the witness for the judge's examination, which might).

Rather, the delay in this case only amounts to a mere inconvenience. *See State v. Hanslovan*, 147 Idaho 530 (2008) (explaining that a mere inconvenience is not enough to justify denying a motion to withdraw a guilty plea). For example, the State's argument on appeal completely ignores the fact that, even if one of its witness's memories has been impacted, most of the relevant prosecution witnesses testified at the preliminary hearing. (*See generally* 12/16/14 Tr.) There are provisions by which the State could potentially (if it is determined to be

appropriate to do so) present that prior testimony at a subsequent trial. *See, e.g., State v. Sepulveda*, 161 Idaho 79, ___, 383 P.3d 1249, 1252-55 (2016) (discussing the propriety of using preliminary hearing testimony in lieu of live testimony at trial when a witness has become unavailable). As such, even considering its new theory of prejudice raised for the first time on appeal, the State has failed to show how the delay would actually affect its ability to present its case. Therefore, it failed to carry its burden to prove prejudice.

Since the State failed to carry its burden to show that prejudice would result from granting Ms. Sittre's motion to withdraw her plea, this Court should reverse the order denying that motion because that motion presented a just reason to allow Ms. Sittre to withdraw her plea – the new discovery of alibi witness testimony.

CONCLUSION

Ms. Sittre respectfully requests this Court reverse the order denying her motion to withdraw her guilty plea and remand this case for further proceedings.

DATED this 11th day of August, 2017.

_____/s/_____
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 11th day of August, 2017, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

JONNINE LISA SITTRE
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ROBERT C NAFTZ
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_____/s/_____
EVAN A. SMITH
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BRD/eas